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Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, & 15-191

In the Supreme Court of the United States

DAVID A. ZUBIK, et al., *Petitioners*,

v.

SYLVIA BURWELL, et al., *Respondents*.

[Additional Case Captions Listed Inside Front Cover]

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth & D.C. Circuits

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BRIEF *AMICUS CURIAE* OF UNITED STATES CONFERENCE OF CATHOLIC BISHOPS; INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE; WORLD VISION, INC.; CATHOLIC RELIEF SERVICES; FAMILY RESEARCH COUNCIL; ASSOCIATION OF CATHOLIC COLLEGES AND UNIVERSITIES; THOMAS MORE SOCIETY; AND THE CARDINAL NEWMAN SOCIETY IN SUPPORT OF PETITIONERS AND SUPPORTING REVERSAL

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v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,
Respondents.

ROMAN CATHOLIC ARCHBISHOP, et al., *Petitioners*,

v.

SYLVIA BURWELL, et al., *Respondents*.

E. TEX. BAPTIST UNIV., et al., *Petitioners*,

v.

SYLVIA BURWELL, et al., *Respondents*.

LITTLE SISTERS, et al., *Petitioners*,

v.

SYLVIA BURWELL, et al., *Respondents*.

SOUTHERN NAZARENE UNIV., et al., *Petitioners*,

v.

SYLVIA BURWELL, et al., *Respondents*.

GENEVA COLLEGE, *Petitioner*,

v.

SYLVIA BURWELL, et al., *Respondents*.

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INTEREST OF *AMICI*

The United States Conference of Catholic Bishops ("USCCB"); Institutional Religious Freedom Alliance; World Vision, Inc.; Catholic Relief Services; Family Research Council; Association of Catholic Colleges and Universities; Thomas More Society; and The Cardinal Newman Society unite here as amici curiae on behalf of the petitioners in these consolidated cases.[1]

Individual statements of interest are provided in the Appendix to this Brief.

SUMMARY OF ARGUMENT

These cases involve a government mandate that faith-based organizations, over their religious objections, take actions to ensure that their employees can obtain payments for contraceptives and sterilization. If the petitioners abide by their religious beliefs, they face the loss of the ability to sponsor health coverage for their employees and millions of dollars in fines, threatening financial ruin. No one benefits from such an outcome—not the organizations, their donors, their clients, or their employees. Because its chosen means causes greater societal harm, including to religious liberty, than the putative good that its action would achieve, the government's action

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that they authored this brief, in whole, and that no person or entity other than *amici* made a monetary contribution toward the preparation or submission of this brief. The Clerk of this Court has noted on the docket the blanket consent of all Petitioners and Respondents to the filing of *amicus* briefs.

is not the least restrictive means of furthering any compelling government interest.

To accept the principle advanced by the government in these cases is to hold that government has virtually unimpeded power to force faith-based organizations to violate their conscience as a condition for performing their charitable work. To deter or prevent such work by attaching conditions of the sort the government has imposed in these cases would seriously harm the public good. U.S.-based faith-based organizations contribute human services domestically and abroad that are staggering in their size and scope. *Millions* of persons are served, in some instances even by a single faith-based organization. The ramifications of losing such services, which are often life-saving for the needy people served, is sobering to contemplate. The charitable services provided by faith-based organizations have a distinctive character and value that government cannot match or replace. Were it to try, the sheer economic value of those services, even as to a *single* locality or service type, easily measures in the millions of dollars.

Finally, this Court should reject the mischaracterization that petitioners have been required to sign "just a form." History is replete with instances in which an individual went to his or her death to avoid committing an act objectionable to the individual on religious grounds, though thought by others to be innocuous. The petitioners object not to what *the government* does, but to what *they themselves* have been required to do by the government. As this Court has repeatedly ruled, it is not for the judiciary

to resolve or substitute its judgment for that of the objector on questions of moral complicity.

ARGUMENT

I. There Is a Powerful Countervailing Interest in the Continued Viability and Service of Faith-Based Organizations

These cases involve a government mandate that faith-based organizations ("FBOs"), over their religious objections, take actions to ensure that their employees can obtain payments for contraceptives and sterilization procedures from the issuer or third-party administrator of the FBO-sponsored plan. The petitioners face the loss of employer-sponsored health coverage for their employees and millions of dollars in fines, threatening financial ruin, if they do not comply.

The government cannot satisfy its burden of demonstrating that its action, as applied to these specific petitioners, is the least restrictive means of furthering a compelling interest. Here, the government's interest is not compelling because its action causes greater harm than the putative good that it purports to achieve. *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779-80 (2014); *see id.* at 2780 ("Even a compelling interest may be outweighed in some circumstances by another even weightier consideration."). To accept the principle animating the government's mandate is to threaten the complete loss of employer-sponsored health coverage and financial ruin for organizations whose work is motivated by their faith. No one benefits from such an outcome—not the organizations, their donors, their clients, *or* their employees. Indeed, this consequence of the

government's action includes harm to religious freedom that is so broad in its scope and implications that the action cannot fairly be called the means "least restrictive" of religious exercise.

The respondents have decided, in essence, that the public interest in mandating payments for contraceptives and sterilization procedures by the issuer or third-party administrator of the FBOs' own health plan is so compelling that it would be better to force FBOs out of the public sphere altogether, or make it impossible for them in good conscience to offer any health coverage (and then fine them for not offering it), than allow them to offer plans that do not pay for the objectionable items.[2] Indeed, the respondents maintain this position despite the fact that Congress has afforded express legislative *protection* to those desiring not to provide, facilitate, pay for, or cover abortion[3] *or* contraception (whether abortifacient or not).[4]

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[2] Of course, this outcome is directly contrary to Congress's intent, by passing the Affordable Care Act ("ACA"), to "*increase* the number of Americans covered by health insurance." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2580 (2012) (emphasis added).

[3] Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. H, tit. V § 507(d) (Dec. 18, 2015). This provision, known as the Weldon amendment, has been included in every Labor/HHS appropriations bill since 2004. *See also* 42 U.S.C. § 238n.

[4] Every year since 1999, Congress has exempted insurers with religious objections from a contraceptive coverage mandate in the federal employees' health benefits program, and prohibited other health plans in this program from discriminating against individuals who object to prescribing or providing contraceptives on moral or religious grounds. For the most recent enactment,

Of course, whether the issue is contraception or abortion, forcing a religiously-affiliated charity to stop providing health coverage or shut its doors does nothing to advance the interests of *anyone*, including its employees.

It was not Congress that decided to mandate contraceptive and sterilization coverage. Rather, it was a single agency of the federal government, acting under a provision of ACA that authorized that agency to decide which "preventive services" health plans must generally cover.[5] Millions of persons are enrolled in plans that are exempt from ACA's preventive services provision.[6] The petitioners' plans are not

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see Consolidated Appropriations Act, 2016, *supra* note 3, Div. E, tit. VII, § 726. And every year since 2000, Congress has affirmed its intent that a conscience clause protecting religious beliefs and moral convictions be part of any contraceptive mandate in the District of Columbia. For the most recent enactment, *see id.*, Div. E, tit. VIII, § 808. *See also* 42 U.S.C. § 300a-7 (providing conscience protection with respect to sterilization and other procedures).

[5] 42 U.S.C. § 300gg-13(a)(4) (giving the Health Resources and Services Administration, an agency of the Department of Health of Human Services, the power to define mandated preventive services for women). Congressional debate on this provision centered almost entirely on services to prevent life-threatening illness such as breast cancer. 111 Cong. Rec. S11986-88 (Nov. 30, 2009); 111 Cong. Rec. S12025-28, S12058-60 (Dec. 1, 2009); 111 Cong. Rec. S12113-14, S12119-23, S12126-31, S12143-44, S.12151-52 (Dec. 2, 2009); 111 Cong. Rec. S12267-77 (Dec. 3, 2009).

[6] Of the 156 million non-elderly Americans covered by employment-based health insurance, 26 percent are in grandfathered plans that are not subject to ACA's preventive services provision. HHS, ASPE Data Point, The Affordable Care Act is Improving Access to Preventive Services for Millions of

exempt, even though they have a religious reason for objecting that most other employers lack.[7]

The government insists that this selective mandate is necessary even though alternative health plans with contraceptive and sterilization coverage are readily available on the marketplaces established under ACA. Indeed, the government apparently believes it better that employers offer *no plan at all* than offer a generous and otherwise comprehensive plan without coverage for contraceptives and sterilization, for the fines related to the latter are *18 times greater* than those related to the former.[8] To place these onerous penalties in context, the mandate, and the half decade of rulemaking and litigation that have resulted from it, are purportedly about relieving women who want

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Americans, at 3 (May 14, 2015), aspe.hhs.gov/pdf-report/affordable-care-act-improving-access-preventive-services-millions-americans.

[7] Of course, the Catholic petitioners do not believe that contraceptives and sterilization are either "services" or "health care." Ordinarily infertility is regarded as a disease for which cure is sought. Here, in the view of the Catholic petitioners, those values have been inverted, and the government has decreed *fertility* as a disease condition and temporary (or even permanent) *infertility* as the cure.

[8] 26 U.S.C. 4980H(a), (c) (an employer that fails to provide a group plan is subject to penalties of $2,000 *per year* per full-time employee); 26 U.S.C. 4980D(b) (an employer that fails to offer contraceptive and sterilization coverage as part of its plan is subject to penalties of $100 *per day*, or $36,500 a year, per affected individual).

contraception of an annual expenditure of, roughly, 100 dollars.[9]

To be sure, advancing women's health is a laudable goal.[10] But the Executive Branch cannot lawfully

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[9] *The Cost of Birth Control: By the Numbers*, THE WEEK (Mar. 12, 2012) (noting the $9 monthly cost of some generic versions of the Pill, and the less than $90 annual cost of an implanted IUD over its claimed 12-year life), http://theweek.com/articles/ 477392/cost-birth-control-by-numbers.

[10] Not everyone agrees that contraceptives further women's health. During the rulemaking process, amicus USCCB noted the documented health risks and adverse side effects of contraceptives. USCCB, Comment Letter of Sept. 17, 2010, at 4; USCCB, Comment Letter of Aug. 31, 2011, at 3-4; USCCB, Comment Letter of May 15, 2012, at 4; USCCB, Comment Letter of Mar. 20, 2013, at 2, 4; USCCB, Comment Letter of Oct. 8, 2014, at 2, 4-5. All five letters are available at www.usccb.org/about/ general-counsel/rulemaking/index.cfm under the heading "Religious Liberty." The government, to our knowledge, has never denied these identified risks or side effects, some of which are documented on web sites it maintains. HHS's National Cancer Institute, for example, finds that "the risks of breast, cervical, and liver cancer appear to be increased" with use of oral contraceptives—an especially striking fact in light of Congress's intent to *prevent* breast cancer through ACA's preventive services provision. *Compare* Nat'l Cancer Inst., Oral Contraceptives and Cancer Risk, www.cancer.gov/about-cancer/causes-prevention/ risk/hormones/oral-contraceptives-fact-sheet, *with* note 5, *supra* (citing floor debate on the preventive services provision).

Today no lengthy search is necessary to uncover references in the print and electronic media to injuries caused by birth control. *E.g.*, *Bayer Says It's Paid $142M Over Birth Control Lawsuits*, CHICAGO TRIB. (Apr. 26, 2012) ("Bayer says settlements of U.S. lawsuits over its Yasmin birth control pill have risen to $142 million. Bayer says it has resolved more than 600 suits claiming that Yaz causes blood clots, some of which were fatal."), articles.chicagotribune.com/2012-04-26/business/chi-bayer-says-its-paid-142m-over-birth-control-lawsuits--20120426_1_bayer-

advance that goal by means destructive of other important interests, especially those that are constitutionally or statutorily protected, most particularly by the Religious Freedom Restoration Act ("RFRA"). *Hobby Lobby*, 134 S. Ct. at 2780 (noting that a compelling interest "may be outweighed" by weightier considerations).

Here, the consequences of an Executive Branch mandate that faith-based organizations, as a condition for financial survival, take steps to ensure that their employees can obtain drugs and procedures to which the organizations have a religious objection—and the concomitant loss to society as those organizations are thereby fined into irrelevance or driven out of the public sphere altogether—would be a grave blow to the public interest.

A. What Is at Stake

Stephen Monsma, a leading researcher on faith-based organizations, notes that if government infringement of religious liberty were to cause a significant number of FBOs to withdraw from certain areas of service or leave the public square entirely, "a major portion of the nation's social safety net of human

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lawsuits-yaz; Randi Kaye & Shawna Shepherd, *Families, Lawsuits, Raise Questions About NuvaRing*, CNN (Apr. 7, 2015) www.cnn.com/2015/04/06/us/families-lawsuits-raise-questions-about-nuvaring/; Julie Deardorff, *Lawsuits Pile up over Popular Birth Control Pill*, CHICAGO TRIB. (Sept. 15, 2013), articles.chicagotribune.com/2013-09-15/health/ct-met-birth-control-risks-20130915_1_drospirenone-clots-pills/; Natasha Singer, *Health Concerns Over Popular Contraceptives*, N.Y. TIMES (Sept. 25, 2009), www.nytimes.com/2009/09/26/health/26contracept.html?_r=0.

services would be lost. There would be major public policy consequences, as some would go without needed services and private secular agencies and government—which is already under pressure to cut back on its services to those in need—would have to scramble in an effort to find some way to make up for the major gaps now created." [11]

One way to understand the dramatic impact of churches and other FBOs in the nationwide provision of social services is to imagine life without FBOs:

> Without [them], one-third of the children now in day care centers would have no place to go. Most scout troops and twelve-step groups would have no meeting place. Many food cupboards, soup kitchens, and homeless shelters would disappear, leaving a large number of people hungry and on the streets. New immigrants and refugees would lose their strongest supporters and their anchor as they move into mainstream American life. Numerous old and sick people would be neglected, and the waiting list for institutionalized care would double. The list goes on and on.... [12]

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[11] STEPHEN V. MONSMA, PLURALISM AND FREEDOM: FAITH-BASED ORGANIZATIONS IN A DEMOCRATIC SOCIETY 16 (2012).

[12] RAM A. CNAAN, THE INVISIBLE CARING HAND: AMERICAN CONGREGATIONS AND THE PROVISION OF WELFARE 81 (2002).

In short, if FBOs disappeared, "a crisis of the first magnitude would exist in the nation's social safety net."[13]

That is the *global* picture. The consequences at the *local* level are no less dismal when a refusal to protect religious freedom forces a major FBO to stop providing an essential service. After 103 years of placing children with families in Boston, Catholic Charities of Massachusetts ("CCM") had to stop providing adoption services because of a state rule requiring the agency to place children with couples in relationships inconsistent with CCM's religious principles. In the two decades preceding its closure, CCM had "placed more than 720 children for adoption , many of them the hardest to place children."[14] The Boston Globe predicted that, as a result of CCM's departure, "[f]oster children could face longer waits in an already backlogged system, and specialists say other agencies will have to scramble to pick up the Catholic Charities' caseload. Whether they can replace its network of seasoned, caring social workers is another question."[15] One adoption agency director called the outcome "a shame because it is certainly going to mean that fewer children from foster care are

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[13] MONSMA, *supra* note 11, at 19.

[14] Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22 BYU J. PUB. L. 475, 493 (2008).

[15] *Id.*, quoting Michael Levenson, Workers Rush to Fill Void Left by Boston Agency's Decision, BOSTON GLOBE (Mar. 11, 2006), www.boston.com/news/local/articles/2006/03/11/workers_rush_to_fill_void_left_by_boston_agencys_decision/.

going to find permanent homes."[16] In an "all-or-nothing gambit," Professor Robin Wilson concludes, everyone lost—"Catholic Charities lost, prospective adoptive parents lost, and so did many children in Massachusetts. Driving providers from the market who may have been able to continue in their roles with a legislative exemption impoverishes the whole enterprise."[17]

Even as to adoptions, the problem is not limited to Massachusetts. Faced with similar requirements with no religious accommodation, Catholic Charities in Illinois and the District of Columbia also concluded that they could no longer do adoptions.[18]

Of course, impending religious conflicts are not limited to a particular service like adoption. In California, the Department of Managed Health Care has decreed that California law "requires health plans to cover abortion as a basic health care service."[19] The California abortion mandate applies even to elective abortions, and there is no exception for FBOs.

What is implicated in this case, as in the others above, is a government command that FBOs adopt changing secular mores on human reproduction and

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[16] As quoted in Levenson, *supra* note 15.

[17] Wilson, *supra* note 14, at 493.

[18] Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. CONTEMP. LEGAL ISSUES 279, 313 (2013).

[19] Letter from Shelley Rouillard, Director, California Dep't of Managed Health Care, to Catherine Short (Sept. 8, 2014).

sexual ethics, and act inconsistently with their own religious beliefs on those issues, or face government sanctions so severe that they threaten the ability of the FBOs even to exist. And the contribution that those FBOs make, as demonstrated below, is breathtakingly large, brings added value that government and secular counterparts cannot match, and has an exceptionally high replacement value even were replacement contemplated or attempted. Impeding the work of FBOs or driving them out of the public arena does nothing to help their clients, their donors, their volunteers, *or* their employees.

Requiring that an FBO take steps to ensure that its own workforce can obtain, at no cost, items and procedures that violate the agency's own religious teaching is also a serious and destructive intrusion into the rights of religious exercise, church self-governance, free association, and free expression.[20] Religious belief is not extrinsic to the work of an FBO, but rather the very heart of, and motivation for, its work. Persons who voluntarily associate with a religious organization, whether as employees or otherwise, implicitly (and often explicitly) consent to

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[20] This Court has recognized the important interest in preventing government encroachment upon church governance and operation since at least the mid-nineteenth century, *Watson v. Jones*, 80 U.S. 679 (1872), a time when the religious community provided great (and in some cases virtually exclusive) outreach in human services to an expanding immigrant population. Later cases recognize that this interest is protected under the First Amendment Religion Clauses. *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Kreshik* v. *Saint Nicholas Cathedral*, 363 U.S. 190 (1960); *Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church* v. *Mary E.B. Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969).

the religious and moral convictions that animate and underlie the organization's work.[21]

B. The High Volume of Services Contributed by FBOs in Advancement of the Common Good

FBOs are among the largest and most critically needed U.S.-based deliverers of human services in the world measured by the scope of services provided and the number of persons served.

In 2014, for example, Catholic Charities agencies in the United States served over 8.7 million people, with total expenditures exceeding 4.4 billion dollars.[22] Their impact in just one major metropolitan area is illustrative. In 2013, Catholic Charities agencies in

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[21] *E.g.*, *Watson*, 80 U.S., at 729 ("All who unite themselves to [voluntary religious associations] do so with an implied consent" to ecclesiastical governance). *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COL. L. REV. 1373, 1408-09 (1981) ("[C]hurches are entitled to insist on undivided loyalty from [their] employees. The employee accepts responsibility to carry out part of the religious mission. [C]hurches rely on employees to do the work of the church and to do it in accord with church teaching."). *Cf.* 78 Fed. Reg. 39870, 39874 (July 2, 2013) (stating that houses of worship and their integrated auxiliaries are "more likely than other employers to employ people of the same faith" who share the religious and moral convictions of the employer, while ignoring the fact that the same reasoning applies to religiously-affiliated employers whose deeply-held religious convictions are lived out through service to the needy).

[22] CATHOLIC CHARITIES USA, 2014 ANNUAL SURVEY: SUMMARY at 1-2, files.catholiccharitiesusa.org/files/publications/2014-Annual-Survey_Summary.pdf?mtime=20150828143835.

New York City and the lower Hudson Valley alone provided over $735 million in services to over 370,000 people.[23] Services included day care, foster care, adoption, community centers, emergency meals, emergency shelters, temporary and transitional residences, permanent affordable housing, counseling, financial assistance, maternity services, supportive housing for the mentally ill, residences for those with special needs and disabilities, and services for immigrants and refugees.[24]

The Salvation Army, to take another example, reports that it offers services in virtually every zip code in the nation, and serves more than 30 million Americans every year.[25] That includes, on an annual basis, 58.4 million meals, nightly shelter for 10.8 million people, treatment for 200,000 people in 142 rehabilitation facilities, more than 400 after-school programs, and immediate and long-term assistance following disasters to 382,000 people.[26]

Another FBO, Lutheran Services in America ("LSA"), is one of the largest nonprofit human-services networks in the United States.[27] It coordinates the

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[23] CATHOLIC CHARITIES, ARCHDIOCESE OF NEW YORK, ANNUAL REPORT 2013, at 5, http://catholiccharitiesny.org/about-us/annual-report.

[24] *Id.*

[25] THE SALVATION ARMY, 2014 IN REVIEW 2, salvationarmyannualreport.org/assets/2015/1%20Our%20Year.pdf.

[26] *Id.*

[27] FORBES, *The 50 Largest U.S. Charities*, www.forbes.com/

work of nearly 300 independent Lutheran health and human service organizations affiliated with the Evangelical Lutheran Church in America or recognized by The Lutheran Church-Missouri Synod.[28] LSA reaches six million people annually, or roughly one in every 50 persons in the United States.[29]

The contribution of U.S.-based FBOs in providing human services is not limited to the United States. They "deliver almost half of the nongovernmental international assistance," and "their size and role is growing, not contracting."[30]

World Vision, Inc. (US) is the largest U.S.-based international relief organization with total revenues in 2009 of nearly a billion dollars. That year it had some 1.2 million donors, and its volunteers contributed over 100,000 hours of their time.[31] Combined with its sister organization, World Vision International ("WVI"), these numbers climb to a total revenue stream of nearly three billion dollars.[32] Both are faith-based. WVI has "40,000 staff members in nearly 100 countries. That's more staff members than CARE, Save the Children and the worldwide operations of the

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companies/lutheran-services-in-america/.

[28] *Id.*

[29] Lutheran Services in America, *Together We Can: Lutheran Services in America*, at 1, www.lutheranservices.org.

[30] MONSMA, *supra* note 11, at 21.

[31] *Id.*

[32] *Id.*

United States Agency for International Development—*combined.*"[33]

Another major contributor to overseas relief efforts is Catholic Relief Services, which in 2014 alone served *85 million people* in 101 countries on an annual operating revenue of roughly $684 million.[34]

Food for the Poor, an interdenominational Christian relief and development organization, works in 17 countries in the Caribbean, Latin America, and the United States. In 2014 alone, it distributed more than 52 million pounds of food and supported hundreds of food-generating projects.[35] Since 1982, it has constructed more than 98,000 housing units for the poor.[36]

There are also overseas and relief organizations in the Jewish tradition, such as American Jewish World Service ("AJWS"). With a budget of nearly $40 million in 2009, AJWS "specializes in making grants to local, grass-roots organizations working to alleviate hunger,

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[33] Nicholas Kristof, *Learning from the Sin of Sodom*, N.Y. TIMES (Feb. 27, 2010) (emphasis added).

[34] CATHOLIC RELIEF SERVICES, 2014 ANNUAL REPORT 1, 33 annualreport.crs.org/CRS_2014_AR.pdf.

[35] FOOD FOR THE POOR, 2014 ANNUAL REPORT 2, www.foodforthepoor.org/about-us/financial-info/files/annual-report-2014.pdf.

[36] *Id.* at 5.

poverty, and disease on the local level in countries throughout the world."[37]

The American Jewish Joint Distribution Committee, a leading Jewish humanitarian assistance organization, impacts lives in 70 countries, with over a century of experience in confronting poverty.[38] In 2015, it provided over $185 million in grants, food, clothing, health care, education, and emergency and other assistance.[39]

These are mere snapshots of the invaluable human aid and services that the religious community provides. The contributions noted here are the tip of the iceberg. The work of FBOs cannot be impeded without devastating damage to society as a whole. Our point, of course, is not that all of these organizations object to the contraceptive mandate. The point, rather, is that once one admits the principle that government can condition the freedom of FBOs to provide important public services upon active cooperation with a government mandate that violates their religious beliefs, then any FBO can be penalized or even shut down with impunity.

Impeding or halting the involvement of FBOs in the provision of human services would also be historically short-sighted. In the United States, the church-based

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[37] MONSMA, *supra* note 11, at 22.

[38] Am. Jewish Joint Distrib. Comm., *What We Do*, http://www.jdc.org/what-we-do/?s=global-topnav.

[39] AM. JEWISH JOINT DISTRIB. COMM., 2015 ANNUAL REPORT 25, http://www.jdc.org/assets/documents/2015-annual-report.pdf.

provision of social services precedes by over two centuries the involvement of the federal government in social welfare.[40] More recent history is especially instructive. Since the 1970s and 1980s, the federal government has increasingly relied upon nonprofit organizations and local authorities in providing social services.[41] The movement toward local and private providers culminated in the charitable choice provisions of federal welfare reform in 1996 that expanded the role of FBOs,[42] provisions that have been replicated in subsequent legislation.[43]

The federal government cannot have it both ways: it cannot rely on an expanded role for FBOs, as Congress has directed, if at the same time it requires them to violate their religious convictions as a condition for fulfilling that role. Indeed, the charitable choice provisions of the 1996 welfare reform law and subsequent legislation say *just the opposite*: they prescribe that FBOs should not be required to shed

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[40] The federal government did not become a major provider of social welfare and services until the New Deal legislation of the 1930s. RAM A. CNAAN, THE NEWER DEAL 3-4 (1999). Religious denominational involvement in the delivery of human services in the United States can be traced to the opening decades of the eighteenth century. *Id.* at 115.

[41] *Id.* at x, xi, 4, 10-14.

[42] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 104 (Aug. 22, 1996).

[43] *See, e.g.*, Children's Health Act of 2000, Pub. L. No. 106-310, tit. XXXIII, § 3305 (Oct. 17, 2000) (codified at 42 U.S.C. § 300x-65); Human Services Reauthorization Act of 1998, Pub. L. No. 105-285, tit. II, Community Services Block Grant Program, § 201 (Oct. 27, 1998) (codified at 42 U.S.C. § 9920).

their religious identity as a condition for taking on an expanded role in the provision of human services, and they specify that FBOs may retain their religious character and control over the practice of their religious beliefs.[44]

C. The Distinctive Character and Value of Services Contributed by FBOs in Advancement of the Common Good

FBOs provide services that government and other organizations cannot reproduce easily or at all, and whose effectiveness government and secular organizations cannot match.

One example, especially germane to this case, is the provision of health care. Nonprofit church-owned hospitals "save more lives, release patients from the hospital sooner, and have better overall patient satisfaction ratings."[45] Religious hospitals "demonstrated significantly better results than for-profit and government hospitals on inpatient and 30-day mortality, patient safety, length of stay, and patient satisfaction."[46] And religious hospitals often provide services that other hospitals do not offer. Catholic hospitals, for example, which care for one of six hospital patients[47] in the United States, "often

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[44] *See* notes 42 & 43, *supra*.

[45] David Foster et al., *Hospital Performance Differences by Ownership* 1 (June 2013), 100tophospitals.com/portals/ 2/assets/ HOSP_12678_0513_100TopHopPerfOwnershipPaper_RB_WEB. pdf.

[46] *Id.* at 2.

[47] To this number, one should add Baptist, Seventh-day

provide more public health and specialty services than other health care providers," including "some traditionally 'unprofitable' services."[48]

Faith-based elementary and secondary schools make a distinctive contribution to the education of the Nation's children that public schools have been unable to match. In 2015, the combined average SAT score for students from religious schools was 1596 points, or 134 points higher than the average score of 1462 for public school students.[49] Students in religious schools are safer than students in public schools, as measured by fewer instances of violent crime and bullying.[50] A higher percentage of students in religious schools report feeling safe from attack or harm in school compared to their public school peers.[51]

FBOs excel in many specialized fields, including drug rehabilitation, prison reform, and adoption. A

Adventist, and other religious-affiliated hospitals, nursing homes, and health clinics in poor communities across the United States.

[48] Catholic Health Ass'n, Catholic Health Care in the United States, at 1 (Jan. 2015), www.chausa.org/about/about/facts-statistics.

[49] Council for American Private Education, CAPE Outlook, *Students Significantly Exceed SAT Benchmark*, 1 (Oct. 2015). Similar achievements gaps have been reported in previous years. *E.g.*, CAPE Outlook, *Private School Students Boost National SAT Scores*, 1 (Nov. 2014).

[50] CAPE Outlook, *Federal Report Looks at Crime and Safety in Schools*, 1 (Jan. 2015).

[51] *Id.*

study by the National Opinion Research Center at the University of Chicago found that "*67 percent* of the graduates of a drug rehabilitation program sponsored by Teen Challenge," a faith-based network of Christian substance-abuse prevention and treatment programs, "were drug-free seven years after participating in the program."[52] That rate is "much higher than the *10 to 15 percent* cure rate for other federally funded drug rehabilitation programs."[53]

In 2005, Michigan instituted a program to provide services to prisoners and ex-offenders to facilitate their reentry into society. Relying heavily on FBOs, the program by 2010 had reduced Michigan's prison population by 14 percent, the largest decline among the 50 states except Rhode Island.[54] "Due to the decline in its prison population, Michigan was able to close fourteen of its corrections facilities, at a cost savings of millions of dollars. And, most importantly, this has been accompanied by a reduction in the rate

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[52] ROBERT WUTHNOW, SAVING AMERICA: FAITH-BASED SERVICES AND THE FUTURE OF CIVIL SOCIETY 159 (2004) (emphasis added).

[53] *Id.* (emphasis added).

[54] MONSMA, *supra* note 11, at 36. The director of the Michigan Department of Corrections said that the role of churches and the faith-based community had been "critically important" to the program's success. *Id.* at 37. As she explained, "We look at people getting out of prison being welcomed into their community by churches, and in some cases that may be the only support system they have because they may not have a family left to welcome them. It makes an incredible difference." *Id.*, citing remarks of Patricia Caruso, Director, Michigan Dep't of Corrections.

of recidivism."[55] Before the program, "one in two parolees returned to prison within three years. That has improved to one in three."[56] Everyone gained from the program—"the taxpayers who have to pay for prisons, the general public that suffers less crime, and the ex-offenders and their families who now have new opportunities to live productive lives."[57]

Faith-based adoption agencies are "especially effective in placing special needs children who usually are hard to place in families."[58] "Of the 3,794 completed adoptions by Catholic Charities agencies in 2009, 1,721 (45 percent) were of children considered to have special needs."[59] In the same year, 541 of 1,716 adoptions (32%) provided by Bethany Christian Services, the largest faith-based adoption agency in the United States, were of hard-to-place older children previously in foster care.[60] Chuck Johnson, CEO of the National Council for Adoption, concluded that on balance, if faith-based adoption agencies

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[55] *Id.* at 36.

[56] *Id.*, quoting Michigan Prisoner ReEntry Initiative, *MPRI: 2010 Progress Report*, 15.

[57] MONSMA, *supra* note 11, at 36.

[58] *Id.* at 31.

[59] *Id.*, citing Mary L. Gautier & Anna Campbell Buck, *Catholic Charities USA: 2009 Annual Survey*, p. 36 (Washington, DC: Center for Applied Research in the Apostolate, Georgetown University, 2010).

[60] MONSMA, *supra* note 11, at 31.

"disappear[ed] overnight," the "whole system would collapse on itself."[61]

International relief efforts by U.S.-based FBOs likewise have advantages that their government counterparts in this country and abroad lack. FBOs often have "existing, trusted, on-the-ground networks down to the village level that the American government and even the host governments do not have,"[62] a point underscored by HHS itself.[63] For example, in Haiti, the poorest country in the Western hemisphere, "more than half of food distributions go through religious groups like World Vision that have indispensable networks on the ground."[64] It would be a "catastrophe" for the citizens of that country if FBOs had to cease providing aid there.[65]

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[61] *Id.* (quoting from interview with Chuck Johnson).

[62] *Id.* at 23.

[63] Gloria Steele, Testimony before the Subcommittee on State, Foreign Operations, and Related Programs, Committee on Appropriations, U.S. House of Representatives (Mar. 23, 2010) ("Nongovernmental, faith-based, and community-based organizations have strong bases of operations in underserved, rural areas where formal health services are limited. Due to their close contact with local residents, these organizations can facilitate behavior change" with respect to disease prevention), quoted in MONSMA, *supra* note 11, at 23. At the time of her testimony, Steele was a senior official in HHS's Bureau for Global Health.

[64] Kristof, *supra* note 33.

[65] *Id.*

D. The Economic Replacement Value of Services Contributed by FBOs in Advancement of the Common Good

The replacement value of FBO-provided human services—that is, the cost that the government and others would be required to pay to replace the services provided by FBOs—is staggeringly high. A study of religious congregations in the Philadelphia area, for example, found that the annual replacement value of the social services they provided amounted collectively to a quarter of a billion dollars.[66] At the time, the City of Philadelphia spent about $474 million dollars annually on social services. "When the two grand sums are combined, about one third of the [annual] cost to maintain quality of life in Philadelphia is voluntarily provided by local religious congregations."[67] A similar study in Kent County, Michigan, calculated that the replacement value of human services provided by local congregations was $95 to $118 million a year.[68]

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[66] Ram A. Cnaan, Jill W. Sinha, & Charlene C. McGrew, *Congregations as Social Service Providers: Services, Capacity, Culture, and Organizational Behavior*, at 55 (Jan. 2004), repository.upenn.edu/cgi/viewcontent.cgi?article=1009&context=spp_papers.

[67] *Id.*

[68] Edwin I. Hernandez & Neil Carlson, *Gatherings of Hope: How Religious Congregations Contribute to the Quality of Life in Kent County*, at 53 (Grand Rapids, MI: Center for Social Research, Calvin College, 2008), cited in MONSMA, *supra* note 11, at 18 n.12 and accompanying text.

The economic value of the contributions of religiously-affiliated colleges and universities is similarly compelling. According to data compiled by amicus Association of Catholic Colleges and Universities, Catholic colleges and universities (to take just one denominational segment within private higher education) enroll nearly one million students in 244 institutions of higher learning. Particularly in fields of national need, such as nursing and teacher education, Catholic higher education produces a disproportionately high number of graduates, compared with other sectors. Institutional student financial aid is awarded to 88% of students in Catholic colleges and universities, averaging more than $13,000. Such support contributes to student success; Catholic higher education retains students through graduation at a higher rate than colleges and universities without religious affiliation, and graduates of these institutions also have the lowest student loan default rate among all sectors—seven percent compared to the national average of 14.7%. Of their own volition, students choose to attend a Catholic college or university fully aware of, and in many cases because of, the values it espouses.

These are just a few examples. The economic impact we have described is not unique either to a particular urban area (Philadelphia) or to any particular sector of the economy (higher education). Are we really to understand from the government that these and other faith-based institutions, and the faith that inspires them, are simply *irrelevant* to the common good? Must *all* organizations—even those founded upon and motivated by sincere religious convictions—either conform to the Executive Branch's

views on sexual ethics or stop serving the public? Is this the price that has to be paid by American society simply for a religiously-affiliated organization to do good works? Federal laws such as RFRA were approved virtually unanimously by Congress to provide the answer to these questions.

This case is only tangentially about contraception. If the government can force even private religious organizations to help their own private workforce obtain drugs and procedures that violate the organizations' religious convictions, there is little government cannot do. The next incremental step, a step *already* taken in California, is mandatory coverage of abortion. And the next, after this, may be "assisted suicide," which is now legally permitted in some cases in at least four states but may one day be mandated as an item of "health" coverage.[69]

Religious organizations should not be put to this Hobson's choice by the government. A government that places such pressure on religious charitable organizations engages in a kind of soft tyranny, for it means that they must think and act as the government commands on sensitive issues surrounding human life and reproduction, issues on which the religious

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[69] The federal government itself has now proposed mandatory coverage of medically and morally controversial "gender transition" services. 80 Fed. Reg. 54172, 54220 (Sept. 8, 2015). For a discussion of the proposed rule by nearly a dozen objecting organizations, including the Christian Medical Association and National Catholic Bioethics Center, *see* Comment Letter of Nov. 6, 2015, www.usccb.org/about/general-counsel/rulemaking/upload/Comments-Proposal-HHS-Reg-Nondiscrimination-Federally-Funded-Health.pdf.

community has a distinctive and prophetic voice. That is a far cry from the manner of government that the Founders contemplated, let alone that RFRA requires.

The burden that the government has imposed on the petitioners as the price for continuing to serve the public is not trivial. We turn to that issue next.

II. The Accommodation Is Not "Just a Form"

A recurring motif in this litigation has been the suggestion, by the government and even some courts, that the petitioners are required to sign "just a form" and, for that reason, are not substantially burdened in their religious freedom. *See, e.g.*, *University of Notre Dame* v. *Burwell*, 786 F.3d 606, 621 (7th Cir. 2015) (finding that the accommodation "poses no burdens" because a "university official must only fill out a simple form").

The "form" in this case refers to (a) the "self-certification" that the petitioners are required to execute and deliver to their insurance company or third-party administrator ("TPA"), or (b) the alternative notice that the petitioners are required to deliver to the government. 26 C.F.R. § 54.9815-2713A; 45 C.F.R. § 147.131. The petitioners have a religious objection to the form and the notice because, based on their sincerely-held religious beliefs, they hold that the execution and delivery of these documents make the petitioners, through their own actions, complicit in a process for providing contraceptives and sterilizations specifically to persons enrolled in their health plan and only for as long as they remain enrolled in the plan. On similar religious grounds, the petitioners object to

remaining in a contractual relationship with an insurer or TPA paying for such items for plan enrollees.[70]

This Court should roundly reject the "it's-just-a-form" argument. History is replete with instances in which an individual went to his or her death to avoid committing an act objectionable to the individual on religious grounds, though thought by others to be innocuous.

Three incidents, two from Christian and one from Jewish tradition, make the point. Like the petitioners here, Sir Thomas More famously refused to sign a governmentally-prescribed oath or swear to its contents. As described in Robert Bolt's play, More's daughter Margaret urges him simply to "say the words of the oath and in your heart think otherwise."[71] The Duke of Norfolk likewise urges More to follow the example of others, well known to him, who had signed: "Thomas, look at those names. You know those men! Can't you do what I did, and come with us, for fellowship?"[72] More is said to have asked in return whether, when Norfolk went to heaven for following his conscience and More went to hell for violating his

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[70] *See* Brief for Petitioners in Nos. 14-1418, 14-1453 & 14-1505, at 19, 23-25, 27-29, 35-37, 44 (filed Jan. 4, 2016); Brief for Petitioners in Nos. 15-35, 15-105, 15-119 & 15-191, at 20, 39, 42-45, 51-52 (filed Jan. 4, 2016).

[71] A MAN FOR ALL SEASONS, Act II, veng6a.pbworks.com/w/page/8219356/The%20Complete%20Script%3A%20A%20Man%20For%20All%20Seasons.

[72] *Id.*

own, Norfolk would join him in hell "for fellowship."[73] For his refusal, More was beheaded.

The death of Polycarp, a disciple of St. John the Apostle and appointed by him as Bishop of Smyrna, has been described as "the earliest surviving authentic account of Christian martyrdom outside the New Testament."[74] Polycarp's predicament, like More's, can be said to have involved "mere words." "Where is the harm in just saying 'Caesar is Lord,'" Polycarp was asked. When he refused to say those words, the authorities, trying to reach some "accommodation" with him, twice suggested that he swear a *different* oath: "Swear by the Luck of Caesar." When the 86-year-old Polycarp remained steadfast in his refusal, he was burned alive and, when the flames failed to bring about his demise, stabbed to death.[75]

Eleazar, likewise a man of advanced age, was required by civil authorities to consume food in violation of Jewish dietary laws during the time of the Maccabean Revolt. When he refused, his acquaintances took him aside and "privately urged him to bring his own provisions that he could legitimately eat, and only to *pretend* to eat the sacrificial meat prescribed by the king."[76] But Eleazar considered it wrong even to pretend to do wrong,

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[73] *Id.*

[74] EARLY CHRISTIAN WRITINGS 115, 117 (trans. Maxwell Staniforth & Andrew Louth) (1968).

[75] *Id.* at 125-31.

[76] 2 *Maccabees* 6:21 (rev. New Am. Bible) (emphasis added).

noting the harm that would be caused if others, especially the young people of the Jewish community, were to believe, from Eleazar's actions, that he had violated the precepts of his faith. For his refusal, he was tortured and killed.[77]

Some may believe that a mental reservation, a difference in wording, or mere pretense at cooperation will satisfy a religious obligation, but More, Polycarp, and Eleazar plainly did not. As this Court recently reiterated, it is not for the judiciary to resolve questions of moral complicity or to substitute its own theology for that of a religious objector on matters of conscience. *Hobby Lobby*, 134 S. Ct. at 2778-79. Religious beliefs need only be sincerely held. They "need not be acceptable, logical, consistent, or comprehensible to others" to warrant legal protection. *Thomas* v. *Review Bd.*, 450 U.S. 707, 714 (1981). That people throughout history have been willing to die for the sake of a religious obligation that others may, then and even now, see as a mere trifle is a testament to the seriousness, persistence, and depth of religious conviction that laws like RFRA are intended to protect.

As was true of More, Polycarp, and Eleazar, the petitioners are not complaining about what the *government* may do to provide items to which the petitioners object, but rather about the conduct that the government is requiring of *petitioners themselves* and requiring *them* to enable, on pain of ruinous financial penalties. Among other things, the petitioners object to executing and delivering a form or notice mandated by the government which they view

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[77] *Id.*, verses 24-31.

as a religious and moral wrong. These are not cases in which a religious stakeholder objects to the *government's* own conduct. *E.g.*, *Bowen* v. *Roy*, 476 U.S. 693 (1986) (involving objection to *government's* use of social security numbers). Rather, the petitioners have a serious and sincere religious objection to actions *they* are being directed to take, and they face government penalties for non-compliance if *they* refuse to take those actions—precisely the type of situation that RFRA is intended to address.

CONCLUSION

The judgments below should be reversed.

Respectfully submitted,

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January 11, 2016

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APPENDIX (List of Amici)

1. The United States Conference of Catholic Bishops ("USCCB"). The USCCB is an assembly of the leadership of the Catholic Church in the United States. The USCCB seeks to unify, coordinate, encourage, promote, and carry on Catholic activities in the United States; to organize and conduct religious, charitable and social welfare work at home and abroad; to aid in education; to care for immigrants; and generally to further these goals through education, publication, and advocacy. To that end, the USCCB provides and promotes a wide range of spiritual, educational, and charitable services throughout the country and around the world.

2. Institutional Religious Freedom Alliance ("IRFA"). IRFA is a national, nonpartisan and multi-faith association of faith-based organizations. IRFA advocates for public policies that enable faith-based organizations to make their distinctive contributions to the public good, and equips the organizations themselves to adopt best practices that protect their religious rights. Its members and allies include schools and colleges, overseas development and domestic charities, religious freedom and child welfare organizations, churches and denominational agencies.

3. World Vision, Inc. World Vision is a nonprofit Christian humanitarian organization that, for over 65 years, has been dedicated to working with children, families, and their communities in nearly 100 countries to reach their full potential by tackling the causes of poverty and injustice. Motivated by their faith in Jesus Christ, World Vision's employees serve

alongside the poor and oppressed—regardless of their religion, race, ethnicity or gender—as a demonstration of God's unconditional love for all people. As a faith-based organization, World Vision has an interest in the correct application of RFRA.

4. Catholic Relief Services ("CRS"). CRS was founded in 1943 by the bishops of the United States to assist the poor and disadvantaged outside this country—helping people in need for over 70 years. CRS touches more than 80 million lives annually in more than 101 countries, by addressing the root causes and effects of poverty, promoting human dignity, and helping to build more just and peaceful societies. CRS's relief and development work is accomplished through programs of emergency response, HIV/AIDS relief and prevention, health, agriculture, water, education, microfinance, and peacebuilding.

5. Family Research Council ("FRC"). FRC is a nonprofit organization located in Washington, D.C. that exists to advance a biblical Christian worldview in government and culture. FRC believes in protecting all people's rights to adhere to and pursue their religious beliefs. Integral to such pursuit of religion is the ability to pursue a religious mission through a nonprofit organization. Consequently, FRC has a strong interest in ensuring that religious nonprofit organizations have the freedom to adequately communicate and live out their religious mission in every aspect of their organization—an issue this case directly implicates.

6. The Association of Catholic Colleges and Universities ("ACCU"). Founded in 1899, ACCU is the collective voice of Catholic higher education in the

United States. ACCU's membership includes 196 accredited Catholic institutions of higher learning in the United States, whose membership enrolls 95 percent of students at such institutions. ACCU's affiliate members include associations of Catholic colleges and universities sponsored by particular religious orders. ACCU's mission includes strengthening the mission and character of Catholic higher education, and ACCU is often involved in educating the general public on issues relating to Catholic education.

7 The Thomas More Society. The Thomas More Society is a nonprofit, national public interest law firm dedicated to restoring respect in the law for life, family, and religious liberty. Its attorneys have defended speech and conscience rights of countless individuals, nonprofits, and companies across the country. Thomas More Society also represented Catholic Charities of Illinois in its attempt to continue offering foster care and adoption services while still adhering to its core religious beliefs about marriage and family.

8. The Cardinal Newman Society ("The Society"). The Society is a nonprofit organization established in 1993 for religious and educational purposes to promote and defend faithful Catholic education. The Society fulfills its mission in numerous ways, including supporting education that is faithful to the teaching and tradition of the Catholic Church; producing and disseminating research and publications on developments and best practices in Catholic education; and keeping Catholic leaders and families informed. The Society serves many Catholic schools and colleges

across the country which are subject to the HHS mandate, despite the fact that it conflicts with their sincerely-held religious beliefs.